AMERICAN MARRIAGES ABROAD.

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AMERICANS abroad have of late been more or less troubled, and some have even been put to great inconvenience, by a recent order of the State Department, forbidding Ministers and Consuls from certifying officially as to the marriage-laws and their requirements in any parts of the United States. Not only have American citizens been thereby prevented from marrying, but some already married have felt a doubt as to the legality of their union.

The reasons given by the Secretary of State for this order were that certificates given by Consuls have sometimes been erroneous in their statements about the marriage-laws in the United States, and that sometimes excessive fees have been exacted. Some who maintain the propriety of this order say, among other things, that it will hinder marriages between wealthy American young ladies and foreigners, especially titled ones—marriages which they seem to lament. While we do not hold that such marriages are generally unfortunate or that they often produce unhappy results, we are not so much concerned with them as with marriages between American citizens temporarily abroad, in the way of which the Government has placed obstacles. We hold, on the contrary, that the Government should expedite rather than hinder the business of its citizens, and should protect them *so far as possible and proper*. In these last words is, perhaps, to be found the key to this change of policy. The Department has shirked even more than formerly any action touching, in the least, municipal law, since it has had as its legal adviser an eminent theoretical writer on various branches of law, but a man who has never been, we understand, a practising lawyer and who prefers never to speak on a question of municipal law.*

* This article was written some months ago.—ED.

There is a tendency, too, observable in the recent decisions of the Department to the assertion of State-rights and to a restriction of the powers of the organs of the General Government, contrary to the centralizing tendencies which had for some time prevailed. It is held that a Consul, being an officer of the Federal Government, cannot properly certify to marriage-laws or civil *status* in the separate States. But as the separate States are not allowed to send Ministers and Consuls,—who would not be recognized in foreign countries, even if sent,—and as it is only the officials of the General Government that can represent or protect the interests of citizens of the separate States, who but the Consul or Minister can sign a certificate when it is rendered expedient, or even necessary, by the laws and regulations of a foreign government?

The reasons why such preliminary certificates are demanded spring from the conflict between the marriage-laws of various countries. Our Government and our courts maintain, very properly, that a marriage is valid in the United States, if performed according to the law of the country in which it is celebrated; but in the effort to conform to the requirements of the local law very great practical difficulties are often met with. The local law regards two things: first, the individual *status* of the parties to be married—*i.e.*, whether they be of sufficient age, and whether they have the consent of their parents (if such be necessary), as well as certain considerations of public order and morality, as, *e.g.*, that they are not already married, or are not related to each other within the degrees prohibited by law; secondly, the formalities attending the solemnization of the marriage. These latter are generally easy enough to comply with, as they relate simply to the form of marriage required by law, the presence of the civil official, the publication of banns, the notification of intention, the registration, and so forth. The difficulties are caused by the requirements about the *status*, as it is held in some countries that the Personal Law (as it is technically called) of the individual follows him everywhere. This it is easier to show by examples.

The French Code (Art. 170), while permitting the marriages of Frenchmen abroad to be celebrated according to the form usual there, insists on a compliance with all the requirements of the French Personal Law. So many English young girls were married in England to Frenchmen who had not, for instance, obtained the consent of their parents, and so often were their

marriages declared null in France for this reason, and they themselves repudiated and abandoned, that it became a matter of public scandal. In Parliament, and by public opinion, the English Government was urged to do something to put a stop to this state of things. The principles governing family relations in the two countries were, however, so different that it was found impossible to make a treaty ; and the British Government contented itself with being able to exact from the proper French Consul a certificate that the bridegroom had fulfilled all the requirements of the French law. One of the best-known cases of this sort was where a young French girl of large fortune, Mlle. d'Imécourt, married, at London, Paul Musurus Bey, the son of the Turkish Ambassador : on the demand of the girl's mother the Civil Tribunal of the Seine, in 1881, declared the marriage null and void, it having been contracted without the consent of the mother.

Marriages of foreigners in France are subject to French law as far as concerns the form of celebration; since the Government cannot allow other persons to exercise within its territory a function exclusively reserved to officials of the *État Civil.* When Bonaparte, at one of the meetings of the Council of State, asked why the Code said nothing about the marriage of foreigners in France, Réal replied to him, that it was because a previous article had declared that foreigners residing in France were subject to French laws. As concerns their *status,* foreigners in France remain subject to the laws of their own country, provided these laws are not opposed to good morals or to public law. On this point French decisions are unanimous.

Now the question comes, How can a foreigner in France show that in marrying he is doing nothing contrary to the laws of his own country ?

When a man wishes to be married in France, he must first go to the *Mairie* of the district where one of the parties is domiciled, and have a day appointed on which both parties, with their friends and relatives, can come for an examination. At this examination both parties must answer a series of questions with regard to their *status*, their relationship, and their intentions, some of which must be confirmed by other evidence. They must present, at the same time, their papers, which include a copy of the registry of their birth, a certificate of the legal marriage of their parents,—for the rules are different for the marriages of legitimate

and illegitimate children,—and the certified and attested consent of the parents, unless these be present to give their verbal consent. There is also sometimes required evidence to show whether it is necessary to publish the banns only in the place where the marriage is solemnized, or also in the country of the foreigner. When the *Maire* is satisfied on all these points, the banns are published, and posted in a public place set apart for that purpose at the *Mairie* for three successive Sundays. It is only after this that a day is appointed for the marriage, when the *Maire* dons his tri-colored scarf and proceeds to the celebration after the civil form required by the French law. The register is then signed by the parties and their witnesses, attested by the *Maire,* and a marriage-certificate is given for a ridiculously small fee.

Americans have more difficulty than other foreigners in showing that they are in conformity with the laws of their home. Even Germany and Switzerland, which are looser confederations than the Federal Union, have general marriage-laws of comparatively recent enactment. Probably nowhere in the United States is it necessary to have the formal consent of the parents to a marriage, where the contracting parties are at least of the ordinary legal age. In very many States there is no public official registry of births and marriages. Who is to certify to the existence of a law requiring the publication of banns or of the marriage? Indeed, who is to certify as to any of these things? The *Maire* is a civil and not a judicial officer; his province is not to weigh testimony as in a court of justice, but merely to accept a formal, properly certified statement of the actually existing foreign law. It is obvious that he cannot accept simply the opinion of a lawyer. How many American courts, without a special provision of law, would be willing to issue such certificates, except in the form of a judgment in a case tried before them? The Attorney General, or Secretary of State, might be willing to answer the question of a Minister or a Consul, addressed to him by letter or telegram, as to the requirements of the statute law; but he would hardly be willing to put it in the form of an official certificate. Even if such certificates were issued by competent home authorities, they would have to be legalized by the signature of the Governor and the official seal of the State; which must, in their turn, be legalized by the signature of the Secretary of State of the the United States; which must, in its turn, be legalized either by

the French Minister at Washington, or by the American Minister at Paris, or the American Consul of the district where the marriage is to take place ; these being the only signatures and seals which the French authorities can officially recognize. The only persons, it would seem, who could easily issue a certificate which would at once be accepted, are the American Minister and the American Consuls. They would not need the same amount of formal evidence to the existence of the laws in question ; and they would be willing and able to judge of ordinary testimony as to births and marriages, which could not be placed before a French *Maire*. A man who has not the training or judgment to do this is unfit to be a Consul ; and if he be not prudent enough to ascertain the exact requirements of the statute law in any special State, by consulting the laws themselves, or by an inquiry of an authorized exponent of them, by letter or telegram (answer paid), before signing the certificate, he should be dismissed.

It must be remembered that all such certificates are mere formal proofs required as preliminaries to the solemnization of a marriage in France ; they are by no means final proofs, and can be gone behind and set aside by a court of justice in an action to invalidate the marriage. If the marriage be in itself illegal, the certificate could not legalize it ; it only facilitates it. At the same time, an error in fact which had been cured by time (as, for example, with regard to the age or the consent of parents) would probably by no court in the world be allowed to invalidate the marriage. There is, therefore, no occasion for alarm on the part of persons whose marriage in France has been facilitated by certificates from the Consulate or the Legation.

Apparently all these considerations were not placed before the Department of State, or the Secretary would hardly have made some of the statements and deductions contained in his dispatch to Mr. McLane, dated May 9, 1887, or those in the rather sharp rebuke to the late Consul-General Walker, who had maintained the view previously held as to the correctness and propriety of the practice of issuing consular certificates. Extracts from these and other despatches are printed, together with the order in question, in the appendix to Vol. iii. of Wharton's " Digest of International Law of the United States" (pp. 975–983).

It is somewhat surprising to note the naïve astonishment of the Secretary of State that the practice of issuing such certificates

should have sprung up recently. There have always been Americans in France since our colonial days; but the existence of an American colony in Paris, as an important body of residents, dates practically from the time of the Second Empire. There were probably American marriages in those early days solemnized in France, just as there are now occasional American marriages in Russia and Austria. But probably all of these marriages were celebrated, in the lax way usual in those times, at the American Legation by an American or an English clergyman, in imitation of English practice or precedent; or perhaps the ceremony was performed simply by the Minister or Consul. As the number of American residents increased, there was a greater frequency of purely American marriages, as well as of marriages between Americans and Frenchmen. In these latter cases especially, where the parties were to live in France and where the interests of property were taken into account, greater regard was naturally paid to the strict requirements of the French law. Indeed, the marriage of a Frenchman to an American lady at the Legation of the United States in Paris in 1868 was declared null and void by the French courts. What the French law desired was, in reality, only to know that the marriage was not prohibited by the national laws of the foreign party. French *Maires,* following their own routine, naturally desired papers, copies of registers, and other documents, as similar as possible in form to their own. These could not always be obtained; and they then accepted what are called *Actes de Notoriété,* which generally have no real value, but which they also wished drawn up in the French way. As this was difficult, the evidence in question gradually came to be supplemented by certificates issued by the Consul; and finally an understanding was had with the Duc Decazes, when Minister of Foreign Affairs, that such certificates, when issued by the Legation or the Consulate, should be accepted as a sufficient compliance with the French forms. Occasionally, of course, a new or inexperienced *Maire* would at first reject such certificates, because he was unable to understand how anything could be done otherwise than in France; but in such cases he was speedily brought to his senses by an order from the Minister of Justice or of the Interior. This practice, once established in France, continued until Mr. Bayard's order of February 8, 1887.

These preliminary consular certificates were generally the following:

1. That in such a State, at such a time, there did not exist any public Registry of Marriages, but that sufficient evidence had been produced before the Consul that the parents of the party mentioned in the certificate were duly and legally married at the specified time.

2. A similar certificate, *mutatis mutandis*, in regard to the birth of the party.

3. That in a specified State, of which the party was a citizen, it was unnecessary to have the formal consent of the parents.

4. The requirements of the marriage-law in the State referred to.

In Italy, where there is also a large number of American residents, and where there have been many marriages of Americans with each other and with foreigners, the law is very precise. By sections 102 and 103 of the Civil Code, the capacity of the foreigner to contract matrimony is determined by the laws of the country to which he belongs; but he is also subject to the same impediments placed in the way of marriage of Italians, although there is a question among Italian jurisconsults as to whether some of these conditions may not be relaxed. Furthermore, the foreigner who wishes to contract matrimony in Italy must present to the official of the *État Civil* a declaration from the competent authority of the country to which he belongs, stating that according to the laws of that country there is no obstacle to the proposed marriage. By an order from the Ministry of Justice, certificates of Consuls are recognized as the only declarations in the meaning of the Code that can, on occasion of a marriage, be received by the Italian civil authorities. The procedure, we see, is simpler than in France, and these certificates of *nulla osta* (no obstacle), as they were technically called, have, since the establishment of the kingdom, been given by our Consuls, after having had the facts of each case proved to their satisfaction.

The general marriage-law of the German Empire, passed in 1875, says nothing of the marriages of foreigners, which are left governed by the common law, in most cases still uncodified, of the various German states. The ruling principles seem to be that, except for the form, the marriage must be governed by the law of the domicile of the husband. In Prussia, the law requires

foreigners wishing to contract marriage, to show by authentic documents that the laws of their country offer no obstacles.

In Switzerland, where American marriages sometimes take place, and where the question seems to have arisen which called out the order of the Department in question, the general marriage-law of 1874 provides that foreigners are governed by their personal law; and Art. 31, 4, says: "If the bridegroom be a foreigner, the celebration of the marriage can take place only after the presentation of a declaration from the competent foreign authorities that the marriage will be recognized, with all its legal consequences."

Sufficient examples have been given of the difficulty of celebrating a marriage according to the local law, even where there is every intention and desire to conform to it. Not to speak of non-Christian countries, where it is impossible for foreigners to be married except at their Consulates or Legations,—which have extra-territorial rights, and where the Consuls have judicial powers, including those of marriage and divorce,—there are countries where it seems impossible, in certain cases, to get married at all. In Brazil, for instance, although the law admits all religions which do not offend that of the state or public morals, it does not admit that a man can have no religion; and as civil marriage does not exist, a person belonging to no religious confession cannot be validly married. In Peru, the Civil Code demands that all marriages be celebrated with the forms established by the Catholic Church at the Council of Trent. Persons, therefore, who refuse to conform cannot be legally married in Peru.

In view of the irregularities and complications of the marriage-laws of all countries, and of the difficulties placed in the way of Americans desiring to prove their matrimonial capacity, when trying to conform to the local laws of marriage of other countries, it may not be amiss briefly to review the general course which our Government has taken on this question. It has been already stated that, according to the analogy of the English practice, marriages of Americans abroad were frequently celebrated at the Legation, it being supposed that the extra-territoriality and immunities of that place rendered the marriage subject only to the laws which would govern marriage in a territory of the United States. Of late years, even Great Britain has become more cautious in this respect, and has instructed its diplomatic agents

that, although marriages performed in British Legations are valid in Great Britain by statute, they are not necessarily valid elsewhere, and has advised that all such marriages be solemnized in accordance with the requirements of the laws of the country in which they take place—even although within the precincts of the Legation or Embassy.

On June 22, 1860, a law passed Congress (Revised Statutes § 4082) providing that marriages in the presence of any consular officers of the United States in a foreign country between persons who would be authorized to marry if residing in the District of Columbia, shall be valid to all intents and purposes, and shall have the same effect as if solemnized within the United States. This law speaks only of the matrimonial capacity, and says nothing about the form of celebration, or the person by whom the marriage should be performed. It was intended to regulate and correct a practice which had grown up of marriages being celebrated by Consuls in their consular capacity—a practice which had been sanctioned by the Department of State, even to the extent that Consuls at seaport towns were allowed to marry emigrants to the United States at the port of their embarkation, though neither of the parties was an American citizen, on the ground that they might "be so far regarded as domiciled in that one of the United States to which they are bound as to bring them under the shelter of local laws which make marriages solemnized in accordance with the law of the domicile valid." This practice used to cause many a lively scene at the Consulates in Bremen and Hamburg, and even on board the emigrant ships on the day of departure, besides being a source of large revenue to the Consuls. The law did not state that a marriage would be invalid if not performed in the presence of the Consul; but as the Consul was expected to attend, if his presence were asked, and was required to give an official marriage-certificate, it gave a responsible witness of the marriage whose testimony could be easily obtained by any court in the United States. The State Department almost immediately ascertained to its satisfaction—although there do not seem to be any legal decisions to that effect—that this law was practically of little consequence, and could only refer to persons domiciled in the District of Columbia or in the Territories, and not to citizens of the several States; and Mr. Bayard went so far as to say: "It

is very questionable whether, even as to marriages of persons domiciled in the District of Columbia and in the Territories, the Act of Congress has any effect out of those jurisdictions." (Despatch to Mr. Winchester, U. S. Minister at Berne, August 15, 1885. "Foreign Relations for 1885," p. 808.) It is unnecessary to quote further from this instruction, which will present to those who are interested one of the most categorical affirmations of State-sovereignty that has been printed in an American public document during the last twenty-five years. At present Consuls of the United States in Christian countries are forbidden to solemnize marriages. The laws of Massachusetts, which make them civil officials of the State for that purpose, are, therefore, a dead letter.

The issuing of preliminary consular certificates for facilitating marriages abroad was not only implicitly, but explicitly, approved by the State Department for many years; and it was not called into question until the correspondence which led to Mr. Bayard's order of February 8, 1887. This may be seen in the despatch of Mr. Fish to Mr. Marsh of June 19, 1875; and of Mr. Cadwalader to Mr. Marsh of April 15, 1875. In the former Mr. Fish said, among other things: "The competency of this Government to provide generally for the marriage of citizens of the United States abroad has not been called in question, nor has any opinion on that point been expressed." Furthermore, on February 16, 1872, the State Department published Circular No. 39, which was printed in the consular regulations as late as 1886, and which gave a digest of the requirements of the marriage-laws in all the States of the Union, for the information of Consuls when obliged to make a certificate as to the law of any particular State. If this circular had been supplemented by information as to the changes of the marriage-laws in any States,—which it was very easy for the State Department to obtain, as the statutes governing marriage seldom change,—there could be no possible excuse for a Consul issuing an erroneous certificate on this subject.

The importance of this subject will strike any one on the slightest consideration. The question of the conflict of marriage-laws has been taken up at several sessions of the Institute of International Law; and was presented in a Report and Project of International Agreement at the meeting at Heidelberg, in 1887, where M. De Bar maintained the plan of preliminary consular certificates as to status and law in the case of marriage in foreign

countries. In No. 6 of the *Revue du Droit International* for 1887, will be found a brief résumé of the marriage-laws of the chief countries of Europe and America, by M. Emile Stoequart, of Brussels.

To return to our original contention. The order of Mr. Bayard has rendered the marriages of Americans in foreign countries well-nigh impossible. Until this order be rescinded, or some remedy be found by legislation or otherwise, Americans abroad desirous to marry will be obliged either to return to America for that purpose, or to make a sufficiently long visit to England or the nearest British colony, or to go back to a practice which is even still not uncommon among British subjects in places where the marriage-laws are complicated—wait for the arrival of the next National man-of-war, the ex-territoriality of which, fortunately, does not depend on the decision of the Secretary of State. It can hardly be supposed that the Secretary of the Navy will follow the example of his colleague, and refuse the use of National vessels for such a purpose.

A partial remedy for this state of things has been found in France and Italy, by returning to the old system of *Actes de Notoriété* in a somewhat different form; but, as will be seen, this is worse still, because it opens the door to fraud. Four witnesses, who may know, or not know, the real state of the facts, appear before the Consul, and swear to an affidavit prepared by a lawyer or by one of the parties, comprising what was formerly included in the consular certificates. To this affidavit the Consul puts his official seal, and also officially certifies to an exact translation of the paper in the language of the country. This is done on the ground that the administering of oaths to affidavits and the furnishing of sworn translations come within a Consul's ordinary official duties. These affidavits, with their translations, are then taken to the proper official, whether of a tribunal, or of the *État Civil*, by whom they are received on the strength of previous decisions or precedents, and the marriage is allowed to take place. The Consul dares not inquire who the witnesses are, or whether they really know anything of the facts to which they swear; and even professes not to know officially for what purpose the affidavits are to be used, lest he may be removed by the President for rendering a service to a fellow-citizen of the United States in a matter which concerns the latter only as a citizen of Alabama or Kentucky.

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